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Supreme Court of the United States

OCTOBER TERM, 1975

No. 673

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Respondent,

—and—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Petitioners.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Opinion Below

There is an unpublished opinion by Judge Bonsal in the United States District Court for the Southern District of New York dated December 30, 1971, directing the petitioners to proceed to arbitration; a copy is annexed hereto.

Questions Presented

The ultimate question presented by the record and petition is whether this Court will grant certiorari to review an opinion of the Court of Appeals affirming the decision of a District Judge who has heard all the witnesses absent a showing of a conflict between the Circuits or a showing of national importance.

Statute and Rule Involved

Rule 19, of this Court Paragraph 1 and Paragraph 1(b) reads in part,

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

• • •

1(b). Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial pro-

ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Statement of the Case

Petitioners statement of the case omits reference to the unpublished opinion of Judge Bonsal in the United States District Court for the Southern District of New York rendered December 30, 1971, copy of which is appended hereto.

ARGUMENT

The petitioner herein without showing any conflict between the Circuits and without showing any question of law of national importance has asked this Court to take certiorari after the trial on the merits on which the Judge saw and heard all the witnesses and after affirmance by the United States Court of Appeals for the Second Circuit.

After the first District Court opinion by Judge Bonsal petitioner appealed, claiming the Court had, in deciding the case on affidavits,

> "• • • not only denied respondents an opportunity to present its own evidence bearing upon the negotiations and the materiality of the missing terms, but also precluded respondents from examining, under evidentiary safeguards, the broker who prepared the telex and petitioner's officers and employees to adduce contrary evidence that there was no meeting of the minds as to all relevant terms of the charter." (Page 9 of petitioner's brief United States Court of Appeals, for the Second Circuit, Docket No. 72-1150.)

All these witnesses were called and testified. Petitioners' witnesses were not believed. (Petition, 48a); Respondents' were.

We call the Court's attention specifically to Pages 53a and 54a of the petition where the Court of Appeals found that broker DeSalvo had authority to represent petitioner National. Thus, petitioner National was properly before the Court and the Court having found that National had guaranteed the charter National is therefore liable if petitioner Hellenic be held. A finding that National made some kind of agreement was obiously integral to the Court's decision whether that agreement bound National to arbitrate. *Cf. Railroad Companies* v. *Schutte,* 103 U.S. 118, 143 (1881).

Though providing no authority for the point, Petitioner argues that the Court of Appeals improperly approved the District Court's finding that National guaranteed the charter party. A court has an unquestioned power to decide any issue which appears on the record and has been briefed and argued (and in this case, fully aired at trial). *Donovan* v. *Pennsylvania Company,* 199 U.S. 279, 292 (1905); see *Consolo* v. *Federal Maritime Com.,* 383 U.S. 607, 621 (1966); *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508 (1950); *Cardillo* v. *Liberty Mut. Ins. Co.,* 330 U.S. 469, 474 (1947); *Lamar* v. *United States,* 241 U.S. 103, 110-111 (1916); *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660, 664 n.6 (2d Cir. 1975); *Green* v. *Obergfell,* 121 F.2d 46, 55 (D.C. Cir. 1941), *cert. den.* 314 U.S. 637 (1941).

Any other finding would result in even further delay and clogging of the calendars. In this connection we call the Court's attention to the following calendar:

March 24, 1971	—Petitioners refused to perform;
July 27, 1971	—Respondent moved for arbitration;
November 2, 1971	—Petitioners answered respondent's motion;
November 23, 1971	—Motion argued;
December 30, 1971	—District Judge Bonal found for respondent;
May 23, 1972	—First appeal argued before Court of Appeals for the Second Circuit;
June 23, 1972	—Decision of the Court of Appeals rendered setting aside Judge Bonsal's order and ordering the case set down for a trial;
April 25, 1973	—Trial started before Judge Ryan;
February 28, 1974	—Judge Ryan's District Court opinion rendered for respondent;
November 26, 1974	—Petitioners' appeal argued before the United States Court of Appeals for the Second Circuit;
June 24, 1975	—United States Court of Appeals rendered an opinion requiring petitioner Hellenic to submit to arbitration and holding petitioner National as guarantor;
August 8, 1975	—Motion for rehearing denied;
November 6, 1975	—Petition for certiorari filed.

As for the claim that the telex confirmation was not in accordance with the Statute of Frauds of the State of New York, petitioners nowhere cited any modification or reinterpretation of the Statute of Frauds since the Court of Appeals in *Trevor* v. *Wood,* 36 N.Y. 307 (1867) upheld telegraphic signatures. Under New York law, the making of a guarantee is a matter of intent to be proved from all the evidence. Petitioners' argument that New York law requires a specific form of guarantee is fatuous. On the basis of all the credible evidence, the intent of National to be bound to a guaranty is clear. See *Mencher* v. *Weiss,* 306 N.Y. 1, 4, 114 N.E.2d 1771 (1953). *Salzman Sign Co.* v. *Beck,* 10 N.Y.2d 63, 66-67, 176 N.E.2d 74, 217 N.Y.S.2d 55, 57 (1961); *Savoy Record Co.* v. *Cardinal Export Corp.,* 15 N.Y.2d 1, 4-5, 203 N.E.2d 206, 254 N.Y.S.2d 521, 524 (1964); *LaMar Hosiery Mills, Inc.* v. *Credit and Commodity Corp.,* 28 Misc.2d 764, 216 N.Y.S.2d 186 (N.Y. Civ. 1961).

Conclusion

Wherefore, this petition for certiorari herein should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX

APPENDIX

Opinion by Dudley B. Bonsal, *U.S.D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 3363

Motion #9 on 11/23/71

INTEROCEAN SHIPPING COMPANY,

Petitioner,

—against—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents.

MEMORANDUM

BONSAL, *D. J.*

This is a petition to compel arbitration pursuant to the Federal Arbitration Act (9 U.S.C. §§2, 4). Petitioner, Interocean Shipping Company, as owner of the S/S OSWEGO RELIANCE, petitions for arbitration with respect to an alleged one-year time charter between petitioner and respondent dated March 17, 1971. The charter is in the form of a Fixture Note prepared by Poten & Partners, Inc., charter brokers, which acted for both petitioner and respondent, National Shipping & Trading Corp., as agent for Hellenic International Shipping, S.A. The Fixture Note was executed by Poten and telexed to both parties in accordance with the usual trade practice, indicating the

conclusion of charter negotiations. The Fixture Note included all the relevant terms of the charter party with the exception of "SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING ABOUT 15 DAYS WITH PROPER NOTICES." The Fixture Note stated "MOBILTIME EXCLUDING CLAUSES 9, 12AII, 12BII, 12BIII". This incorporated the Mobiltime form charter, which contains an arbitration clause (paragraph 37). It appears that respondents sought to repudiate the Fixture Note on March 24, 1971.

Since the Fixture Note was in writing and incorporated the Mobiltime form including the arbitration clause, it constituted an agreement to arbitrate any dipute arising under the charter party. *Kulukundis Shipping Co.* v. *Amtorm Trading Corp.*, 126 F.2d 978 (2d Cir. 1942); *Dover Steamship Co.* v. *Summit Industrial Corp.*, 148 F. Supp. 206 (S.D.N.Y. 1957); see, *Garnac Grain Co.* v. *Nimpex International*, 249 F. Supp. 986 (S.D.N.Y. 1964).

While the drydocking clause had not been agreed to, this was a minor provision which presumably could be determined by the arbitrators in the event of a dispute. Moreover, since the drydocking was not to take place until November, 1971, and respondent sought to repudiate the Fixture Note in March, 1971, respondent cannot claim it failed to enter into a charter party because it was incomplete as to its essential terms.

The Fixture Note was addressed to the petitioner to the respondent at their telex addresses, the charterer was named as Hellenic International Shipping, S.A., subsidiary of respondent, for which respondent acted as agent.

Petition to compel arbitration is granted.

Settle order on notice.

Dated: New York, N. Y.
December 30, 1971.

DUDLEY B. BONSAL
U. S. D. J.